LOW YAT v. G. C. GRACE.

[Orig. Civil Juris. (Willan, C.J.) June 20, 1947]

Civil Procedure Code, Section 45—1932 Rule 1, Sub-rules 31, 33 and 44 (1)—Application to strike out plaint on ground that it discloses no reasonable cause of action—Action for damages for assault and wrongful imprisonment against person in public service—Indemnity and Validating Ordinance, 1946.

In this case the plaintiff filed a suit against the defendant, an Assistant Commissioner of Police stationed in Kuala Lumpur, claiming damages for assault and wrongful imprisonment. The defendant applied by Summons-in-Chambers that the plaint be struck out on the ground that it disclosed no reasonable cause of action. It was argued that the plaint should be struck out or discharged and made void, under 1932 Rule 1 Sub-rule 33 on account of the provisions of Section 3 of the Indemnity and Validating Ordinance, 1946, which provides in effect that no legal proceeding will lie against a person in the public service for any act or thing done by such person in the war period, if such act or thing was done in good faith and in the execution of his duty or for any one of the other purposes set out in paragraph (a) of the Sub-section (1) of Section 3 of the Ordinance.

Held, (1) that the summary procedure under 1932 Rule 1 Sub-rule 33 can only be resorted to in plain and obvious cases and that the present case was not such a plain and obvious case in which the Court could act under the Rule;

(2) that in this case there was an issue to be tried and this could only be tried by the action pursuing its normal course and being heard in Open Court.

Cases referred to :—

(1) *Vacher & Sons Ltd. v. London Society of Compositors* (1913) A.C. 107.

(2) *Murugappa Chettiar v. Seenivasagam* (1936) F.M.S.L.R. 33.

(3) *Attorney General v. Cotton Powder Company Ltd.* (1921) 2 Ch. 305.

(4) *Hubback & Sons v. Wilkinson, Heywood and Clark* (1899) 1 Q.B. 86.

SUMMONS IN CHAMBERS.

E. D. Shearn for plaintiff.

A. J. Grattan-Bellew (D.P.P.) for defendant.

Willan, C. J. :—On the 13th of December, 1946, the plaintiff filed a suit against the defendant, who is an Assistant Commissioner of Police stationed at Kuala Lumpur, claiming damages on the allegations set forth in the plaint, which reads as follows :—

1. The plaintiff is a contractor and merchant carrying on business at 30, Foch Avenue, Kuala Lumpur, in the State of Selangor, and the defendant is and was at all material times an Assistant Commissioner of Police in charge of the Traffic Branch, Kuala Lumpur.

2. The defendant on the 2nd day of November, 1946, assaulted the plaintiff and took him into custody. At the time of the said assault and taking into custody, the defendant proffered no charge against the plaintiff and the apparent reason for the said assault and taking into custody was because the plaintiff had refused to accept service of a summons to an accused person addressed to one Low Yau; the said summons being a summons dated the 21st day of October, 1946, under section 13 of the Motor Vehicles (Driving Offences) Proclamation in respect of an alleged offence of failing to provide the name, address and driving licence particulars of the person who was in charge of motor vehicle B.1240 at 9.25 p.m. on the 26th day of June 1946.

3. Subsequently to the said assault and taking into custody, the defendant has alleged in a letter dated the 19th day of November, 1946, written on his behalf by Mr. A. Grattan-Bellew of the Attorney General's Department that the plaintiff was taken into custody for using to a police constable abusive language likely to cause a breach of the peace.

4. The plaintiff did not use abusive language likely to cause a breach of the peace or any abusive language to a police constable or at all, the said assault and taking into custody was done by the defendant maliciously or negligently and without reasonable and probable cause.

5. When the defendant took the plaintiff into custody as aforesaid, the defendant threatened the plaintiff with his revolver and in the presence of a number of on-lookers compelled the plaintiff to enter defendant's motor truck and to accompany the defendant to the Central Police Station where the defendant put the plaintiff into the Charge Room and informed the police constable in charge that the bail for the plaintiff was $100.00.

6. The plaintiff did not pay the said bail and he was subsequently released at the request of Mr. S. M. Yong, Advocate and Solicitor, who was brought to the police station by one of the plaintiff's friends.

7. By reason of the matters hereinbefore pleaded the plaintiff has suffered damage and has been seriously injured in his credit and reputation.

The plaintiff prays judgment for the sum of $5,000.00 damages and costs.

The Registrar granted the defendant leave to enter a conditional appearance, on the ground that the defendant, in his affidavit supporting the application for leave to enter a conditional appearance, stated that he was applying to the Court for an order that the suit be discharged and made void on the ground that such a suit does not lie.

Accordingly the defendant entered a conditional appearance, the validity of which was argued previously before me. I held that there is no provision in the local law for entering a conditional appearance, and the defendant was given the opportunity of entering an appearance in the proper form, in default of which the plaintiff would be entitled to enter judgment. The defendant entered an appearance in the proper form, and on the same day as such appearance was

entered, the plaintiff filed an application for leave to amend his plaint by deleting from paragraph 4 thereof the words "maliciously or".

Leave to amend the plaint was granted by the Registrar and an amended plaint filed. The application adjudicated on in this judgment is one by the defendant that the plaint be struck out on the ground that it discloses no reasonable cause of action, alternatively for an order that the plaint be discharged and made void on the ground that the suit should not have been received by, and cannot be maintained in, the Court having regard to section 3 of the Indemnity and Validating Ordinance, 1946.

Mr. Grattan-Bellew, who appeared for the defendant on behalf of the Attorney General, submitted that the plaint should be struck out, or discharged and made void, under 1932 Rule 1 sub-rule 33 on account of the provisions of section 3 of the Indemnity and Validating Ordinance, 1946. The parts of that section which are relevant to this application are paragraph (a) of sub-section (1) and sub-sections (2) and (3). Sub-rule 33 is as follows :—

> The Judge may order any plaint, written statement, counterclaim, or reply, to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the suit, set-off, counterclaim, or reply, being shown to be frivolous or vexatious the Judge may order the suit to be stayed, or dismissed, or judgment to be entered as may be just.

The relevant parts of the above-mentioned section are as follows :—

> 3. (1) No legal proceeding whatsoever shall lie or be instituted or maintained in any Court for or on account of or in respect of —
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> (a) any act or thing done during the war period, whether within or without the territory now comprising the Malayan Union, if done in good faith and done in the execution of his duty or for the purpose of prosecuting the war or maintaining or restoring order or enforcing discipline or ensuring public safety or maintaining supplies and services essential to the community or for the defence of the said territory or otherwise in the public interest by a person holding office, or employed or acting in any capacity in any part of Malaya, in the service of the British Military Administration or otherwise in the service of the Crown or in the public service, or employed by, or acting on behalf of, any statutory or public body incorporated in any part of Malaya, or by any other person acting under the authority of a person so holding office, so employed or so acting;
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> (2) No legal proceeding complaining of an act or thing alleged to have been done otherwise than in good faith (whether done within or without the said territory) during the war period by any person acting or purporting to act for any of the purposes and in any of the capacities in the preceding sub-section mentioned shall be received by, or maintained in, any Court unless a certificate of the Attorney General shall first have been obtained sanctioning the institution of such legal proceeding.
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> (3) For the purposes of paragraph (a) of sub-section (1) of this section a certificate issued by or under the authority of the Secretary of State for the Colonies or the Supreme Allied Commander, South East Asia, or the Governor or the Senior military officer in the said territory that any act or thing was done under the authority of a person so holding office or so employed as aforesaid or was done in the execution of a duty shall be sufficient evidence of such authority or duty and of such act or thing having been done thereunder or in execution thereof, and any such act or thing done by or under the authority of a person so holding office or so employed as aforesaid shall be deemed to have been done in good faith unless the contrary is proved.

It is clear from those provisions of the Indemnity and Validating Ordinance, 1946, set out above, that no legal proceeding will lie against a person in the public service, as the defendant is, for any act or thing done by such person in the war period, if such act or thing was done in good faith and in the execution of his duty or for any one of the other purposes set out in paragraph (a) of sub-section (1) of section 3.

As regards an act or thing alleged to be done during the war period by such person in bad faith in the execution of his duty or for any one of the other purposes set out in paragraph (a) just mentioned, no legal proceeding can be instituted in any Court in respect of such act or thing unless a certificate of the Attorney General has first been obtained sanctioning the institution of such legal proceeding.

"War period" is defined in section 2 of the Indemnity and Validating Ordinance, 1946, as :—

> The period commencing from the eighth day of December, 1941, and continuing until such date as the Governor may by notification in the Government Gazette of the Malayan Union declare to be the end of the war period for the purposes of this Ordinance.

The war period ended on the 31st day of December, 1946,—see Gazette Notification No. 4127 of the 30th December, 1946—and therefore the act or thing complained of by the plaintiff in his plaint took place during the war period.

Mr. Grattan-Bellew submitted that the plaintiff had included in the original plaint the words "maliciously or" in order to comply with the provisions of sub-section (ii) of section 2 of the Federated Malay States Public Authorities Protection Enactment (Cap. 30). That Enactment lays down that where any action is brought against any person for any act done in pursuance or execution or intended execution of any public duty, certain mandatory provisions of that law must be complied with, one of which is that in any

action so brought "it shall be expressly alleged that the defendant acted maliciously or negligently and without reasonable or probable cause".

In view of the allegation of malice in the original plaint, Mr. Grattan-Bellew contended that on account of the provisions of sub-section (2) of section 3 of the Indemnity and Validating Ordinance, 1946, i.e. where bad faith is alleged, a certificate from the Attorney General is a pre-requisite to instituting the action. That since no such certificate had been produced, the Registrar, Supreme Court, should have rejected the plaint under paragraph (a) of sub-section (1) of section 45 of the Civil Procedure Code, because it does not disclose a cause of action.

By paragraph (b) of sub-rule 44 (1) of 1932 Rule 1, the Registrar has jurisdiction to reject a plaint under section 45 of the Civil Procedure Code.

It is clear from the cases decided under paragraph (a) of Order 7 Rule 11 made under the Indian Civil Procedure Code, which is equivalent to paragraph (a) of sub-section (i) of section 45 of our Civil Procedure Code, that this power to reject a plaint should only be exercised if it is clear from the *plaint itself* that even if all the allegations are proved the plaintiff would not be entitled to any relief whatever.

Shortly, the allegations in the plaint itself allege that the defendant assaulted the plaintiff because he, the plaintiff, refused to accept service of a summons addressed to another person; took the plaintiff into custody and then released him without proferring any charge against him. I fail to see how, on the contents of the plaint itself, the Registrar could come to the conclusion that it disclosed no cause of action. Further, there is nothing in our law equivalent to paragraph (d) of the Indian Order 7 Rule 11 that the plaint shall be rejected "where the suit appears from the statement in the plaint to be barred by any law". Accordingly I am satisfied that the Registrar acted correctly in admitting the plaint.

Mr. Grattan-Bellew further contended that in view of the provisions of sub-section (2) of section 3 of the Indemnity and Validating Ordinance, 1946 i.e. on account of there being no certificate of the Attorney General as required by that section, I should strike out the original plaint under the powers contained in sub-rule 33 of 1932 Rule 1, which I have set out above. He referred me to the case of *Vacher & Sons Ltd. v. London Society of Compositors*[1] in which it was held that an action in tort against a trade union came within the prohibition contained in sub-section (1) of section 4 of the Trade Disputes Act, 1906, i.e. that a trade union cannot be sued in tort—and the proceedings were struck out under the English Order 25 rule 4, which is equivalent to our 1932 Rule 1 sub-rule 33.

With regard to this Mr. Shearn for the plaintiff pointed out that an amended plaint was now before me on the record and that in that amended plaint there was no allegation of bad faith and therefore no certificate of the Attorney General was necessary. Mr. Shearn contended that on the authority of the Court of Appeal case—*Murugappa Chetty v. Seenivasagam*[2] —the amendment to a plaint, which was made by consent, dates back to the date of the original plaint. There is nothing on the order in the Court file to show that this amendment was made by consent, but I have had the advantage of perusing the Registrar's note book in which there appears the following note :—

> Summons for leave to amend.
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> By consent the word "maliciously" to be deleted from para 4 of plaint.
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> Costs to def. in any event.

Thus it is beyond doubt that this amendment was made by the consent of both parties, and accordingly I am bound by the decision in that Court of Appeal Case. Mr. Grattan-Bellew, whilst agreeing that as a general proposition an amendment to a plaint dates back to the original plaint, contended that this could only be so if the plaint had been properly admitted and that in this case it should not have been admitted by the Registrar, since it contained an allegation of bad faith, and therefore was barred by sub-section (2) of section 3 of the Indemnity and Validating Ordinance, 1946. That argument has already been disposed of by my finding that the Registrar acted correctly in admitting the plaint.

Finally, on this point, Mr. Grattan-Bellew contended that in the particulars of negligence and want of reasonable and probable cause attached to the amended plaint the plaintiff had still persisted in his allegation of bad faith. Paragraph 2 of those particulars is as follows :—

> The defendant was at all material times a Police Officer and in acting in the way he did as pleaded in paragraphs 3 and 5 of the plaint he did so:—
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> (a) without knowing whether he was acting lawfully or unlawfully; or
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> (b) in the erroneous belief that he was acting lawfully; or
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> (c) recklessly not caring whether he was acting lawfully or not; or
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> (d) well knowing that he was acting unlawfully.

I cannot agree with that contention because the plaintiff, by his action in striking out the words "maliciously or" from his original plaint, has withdrawn the allegation of malice, and I am unable to construe sub-paragraph (d) above—the sub-paragraph relied on by Mr. Grattan-Bellew that malice is still alleged—as a pleading that the defendant acted maliciously.

Therefore, in view of the fact that the plaint now before me contains no allegation of malice against the defendant, the argument of Mr. Grattan-Bellew, based on the provisions of sub-section (2) of section 3 of the Indemnity and Validating Ordinance, 1946, fails.

I now turn to the contention of Mr. Grattan-Bellew that the plaint should be struck out on account of the provisions of paragraph (a) of sub-section (1) of section 3 of the Indemnity and Validating Ordinance, 1946, which I have already set out in extenso earlier in this judgment.

By that paragraph legal proceedings are barred if the act or things complained of has been done in good faith—not now disputed in this case—and if it has been done in the execution of a duty or for any one of the other purposes set out in that paragraph.

In the absence of any written statement of defence I am left in the realm of speculation as to which of the provisions of that paragraph the defendant relies on. I have only the plaint before me and, for the purpose of this application, I must assume that the allegations contained therein are correct. Is the answer of the defendant that he was acting in the execution of his duty? I do not know. Or, will his answer be that he was acting in the public interest. Equally I do not know. I mention these two possible defences because, in the proceedings before me on this application, Mr. Grattan-Bellew in making reference to the original plaint, said :—

> That was plaint as filed on 13.12.46 and was a claim against a public servant who was acting in the execution of his duty or in the public interest.

If I accede to Mr. Grattan-Bellew's request I must be satisfied now beyond doubt that the defendant in acting as it is alleged in the plaint he did act—i.e. in assaulting the plaintiff because he, the plaintiff, refused to accept service of a summons addressed to some other person, and also in taking the plaintiff into custody and releasing him without proferring any charge against him—did so in the execution of his duty or in the public interest.

In support of this contention Mr. Grattan-Bellew drew my attention to paragraph 1 of the plaint which reads as follows :—

> The plaintiff is a contractor and merchant carrying on business at 30, Foch Avenue, Kuala Lumpur, in the State of Selangor, and the defendant is and was at all material times an Assistant Commissioner of Police in charge of the Traffic Branch, Kuala Lumpur.

He relies on the words "and the defendant is and was at all material times an Assistant Commissioner of Police in charge of the Traffic Branch, Kuala Lumpur" as an admission in the plaint that the defendant was acting in the execution of his duty.

I am unable to accept that argument. Those words are merely descriptive of the occupation of the defendant, just as the phrase immediately preceding those words is descriptive of the occupation of the plaintiff himself.

Finally, Mr. Grattan-Bellew cited the case of the *Attorney General v. Cotton Powder Company Ltd.*[3] in which the defendant company were successful in an application by summons to stay the proceedings against them on account of the provisions of the Imperial Indemnity Act, 1920.

But a very material difference between that case and the case now before me is that in the English case the defendant company were in possession of a certificate issued to them by a government department under sub-section (3) of section 1 of the Imperial Indemnity Act 1920. That sub-section is equivalent to sub-section (3) of section 3 of our local Indemnity and Validating Ordinance, 1946. Thus in the English case the defendant company had a complete answer to the action.

In the case before me no such certificate has been produced by the defendant certifying that what he is alleged to have done was done in the execution of his duty. Hence I am still left in the realms of speculation and am again thrown back on the only statement of facts in the Court record, i.e. the plaint. In the absence of any such certificate the only way a Court can decide whether the defendant is protected by the Indemnity and Validating Ordinance, 1946, is by hearing the evidence. As to that Mr. Shearn drew my attention to the provisions of 1932 Rule 1 sub-rule 31, which is as follows :—

> Any party shall be entitled to raise by his plaint, written statement, counterclaim or reply any point of law, and any point so raised shall be disposed of by the Court or the Judge trying the suit at or after the trial, provided that, by consent of all persons concerned or by the order of a Judge on the

application of any person concerned, the point of law may be set down for hearing and disposed of at any time before the trial.

That sub-rule is analogous to the English Order 25 rule 2.

In *Hubbuck & Sons v. Wilkinson, Heywood & Clark*[4], Lindley M. R. sets out when the procedure open to a defendant under the English Order 25 rule 4—equivalent to our local 1932 Rule 1 sub-rule 33—is appropriate, and when the procedure under the English Order 25 rule 2—equivalent to our local 1932 Rule 1 sub-rule 31—should be used. That passage in his judgment, which was the judgment of the Court of Appeal, is as follows :—

> Two courses are open to a defendant who wishes to raise the question whether, assuming a statement of claim be proved, it entitles the plaintiff to relief. One method is to raise the question of law as directed by Order 25 rule 2; the other is to apply to strike out the statement of claim under order 25 rule 4. The first method is appropriate to cases requiring argument and careful consideration. The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression 'reasonable cause of action' in rule 4 shows that the summary procedure there introduced is only intended to be had recourse to in plain and obvious cases.

This exactly expresses my own views on the case before me because I cannot say that this is a plain and obvious case in which I should act under 1932 Rule 1 sub-rule 33. In my view there is an issue which should be tried, and it can only be tried by the action pursuing its normal course and being heard in Court.

Accordingly this application by the defendant must be dismissed with costs.

Application Dismissed.

CHOP SUN CHEONG LOONG AND ANOTHER v. LIAN TECK TRADING COMPANY.

[Orig. Civil Juris. (Spenser Wilkinson, J.) April 19, 1947]

Landlord and tenant—Validity of tenancy created by Japanese Custodian of Enemy Property—International Law.

The first plaintiffs in this case were tenants of a shop No. 95 High Street, Kuala Lumpur, from 1937 until April 1944, when a Japanese military unit purported to take a sublease of the premises from the first plaintiffs. In May 1944, the premises were transferred by the Japanese Custodian of Enemy Property to a Japanese. In June or July 1945, the Japanese occupier sold the goodwill of the firm which carried on business in the premises to the defendants and it is admitted that the premises were then let to the defendants by the Japanese Custodian of Enemy Property. During the Japanese occupation the second plaintiff was absent from Kuala Lumpur and was declared by the Japanese to be an enemy. On the 10th November 1945, the second plaintiff wrote to the first plaintiffs offering them a tenancy of the premises on a monthly basis upon certain terms and this letter was acknowledged and the conditions agreed to by letter dated the 15th November 1945. The second plaintiff did not at any material time give to the defendants lawful notice to quit the said premises, but by a letter dated the 19th November 1945 the first plaintiffs, through their solicitor, purported to give notice to quit to the defendants. The defendants, since the British re-occupation, have from time to time tendered rent to the second plaintiff for every month from September 1945 to July 1946, both inclusive. The claim in this case was for recovery of possession of the premises together with mesne profits from 1st October 1945 and $10,000 damages suffered by the first plaintiffs. The basis of the first plaintiff's claim was that by virtue of their agreement with the Second plaintiff they became tenants of the premises in question and that the defendants were unlawfully put into possession of the premises by the Japanese Custodian of Enemy Property and have therefore been trespassers from the beginning. The defendants contended on the other hand, that the letting of the premises to the defendants by the Japanese Custodian of Enemy Property was a perfectly legitimate act; that in creating defendants' tenancy the Custodian was in a position analogous to that of a statutory agent of the owner; that a monthly tenancy is a continuing tenancy which can only be terminated by due notice and that therefore the defendants were still the tenants of the premises.

Held, (1) that the first plaintiffs had not satisfied the Court that the tenancy created by the Japanese Custodian of Enemy Property in favour of the defendants was in any way illegal at the time it was created;

(2) that the letting of the premises by the Japanese Custodian of Enemy Property to the defendants was a legitimate act which the re-occupying power was bound to recognise and that therefore the tenancy of the defendants was not terminated by operation of law on the re-occupation of the territory by the Allied Forces;

(3) that the second plaintiff in this case had taken no steps to put an end to the tenancy and therefore the tenancy of the defendants was still in existence at the time of the action.

Cases referred to :—

(1) *Alagappa Chettiar v. Kader and others* (1938) F.M.S.L.R. 209.

(2) *Bowen v. Anderson* (1894) 1 Q.B. 164.

(3) *Mellows v. Low* (1923) 1 K.B. 522.

(4) *Chartered Bank v. Bah Keng Ming* Civil Suit No. 18 of 1946.

CIVIL SUIT.

M. Edgar for the first plaintiffs.

Rajendra for the second plaintiff.

Joaquim (*Kitson Khong* with him) for the defendants.

Spenser Wilkinson, J. :—The second plaintiff in this case is the proprietor, the first plaintiffs who are